

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JO ANNE B. BARNHART,                   :

4   COMMISSIONER OF SOCIAL               :

5   SECURITY,                               :

6                   Petitioner               :

7               v.                               :   No. 02- 763

8   PAULINE THOMAS.                       :

9   - - - - -X

10   Washington, D. C.

11   Tuesday, October 14, 2003

12                   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10: 04 a. m

15 APPEARANCES:

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17       General, Department of Justice, Washington, D. C. ; on

18       behalf of the Petitioner.

19 ABRAHAM S. ALTER, ESQ., Rahway, New Jersey; on behalf of

20       the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JEFFREY A. LAMKEN, ESQ.	
4	On behalf of the Petitioner	3
5	ABRAHAM S. ALTER, ESQ.	
6	On behalf of the Respondent	13
7	REBUTTAL ARGUMENT OF	
8	JEFFREY A. LAMKEN, ESQ.	
9	On behalf of the Petitioner	36
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in No. 02-763, Jo Anne Barnhart v. Pauline Thomas.

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN  
ON BEHALF OF THE PETITIONER

MR. LAMKEN: Mr. Chief Justice, and may it  
please the Court:

As the Commissioner of Social Security has long  
construed the disability insurance program, there can be  
no finding of disability unless at least two conditions  
are met. First, the claimant's impairment must be of such  
severity that she cannot -- she is unable to do her  
previous work. Second, the impairments must be of such  
severity that the claimant cannot, considering her age,  
education, and experience, engage in any other kind of  
substantial, gainful work which exists in the national  
economy.

Construing and applying those provisions for  
more than 3 decades, the commissioner has consistently  
concluded that if a claimant continues to function at a  
level sufficient to meet the demands of past work, then  
the claimant is not disabled without the necessity of  
inquiring into whether that particular past job exists in

1 significant numbers. That's the most natural reading of  
2 the statutory text.

3 QUESTION: Mr. Lamken, this case, I think,  
4 involves provisions of both title II and title XVI of the  
5 act, and there are regulations under each.

6 MR. LAMKEN: That is correct. It is --

7 QUESTION: Now, are there any relevant  
8 differences in the text of the two statutes or the regs on  
9 this issue?

10 MR. LAMKEN: No, Your Honor. We don't believe  
11 that there are any relevant differences, that the  
12 commissioner's regulations and the statutes themselves are  
13 all phrased in parallel if not identical language  
14 throughout.

15 There is one difference in that for a disability  
16 insurance, these title II provisions, you have to be  
17 someone who has paid into the program in order to be  
18 eligible for benefits on the way out; whereas, title XVI  
19 is more of a welfare program where whether you've paid in  
20 in the past doesn't matter. But that simply means that  
21 one who has paid into the title II program would get  
22 considerably more benefits than one who has not.

23 QUESTION: But on the test.

24 MR. LAMKEN: On the test, it is an identical  
25 test.

1 QUESTION: There's no difference.

2 MR. LAMKEN: There is no test, Justice O'Connor.

3 QUESTION: Thank you.

4 MR. LAMKEN: That construction preserves the  
5 distinction long recognized in the commissioner's  
6 regulations, in fact, recognizing the commissioner's  
7 regulations from the earliest days of administering this  
8 statute. Between disability insurance, on the one hand,  
9 and insurance against other causes of unemployment, such  
10 as technological and economic change, on the other, an  
11 individual who's doing a job who remains fully capable of  
12 doing that job, but then loses the job because of economic  
13 change or perhaps the job never existed in significant  
14 numbers and the individual chooses to leave, is not unable  
15 to engage in that activity by reason of an impairment,  
16 which is the test under the statute for being entitled to  
17 benefits.

18 And it made sense for Congress to draw that line  
19 because if someone continues to function at a level  
20 sufficient to meet the demands of their previous work,  
21 it's virtually certain that they're capable of doing some  
22 work whether or not that particular past job exists in  
23 significant numbers in the national economy. The point  
24 isn't that the person is expected to return to that  
25 particular past job. Rather, it is their continued

1 functioning at a level sufficient to meet the demands of  
2 that job provides a highly accurate and administrable test  
3 of the fact that they continue to function at a level  
4 sufficient to meet the demands of work generally.

5           In a program that must resolve more than 2  
6 million claims a year, the need for that type of a highly  
7 administrable test, that type of highly accurate test is  
8 particularly acute. And this is precisely the type of  
9 test one would have expected Congress to provide.

10           A potentially large number of Americans today do  
11 not work in jobs that exist in significant numbers in the  
12 national economy. When those workers leave their jobs,  
13 whether they quit, are fired for misconduct, or leave for  
14 other reasons which are good and sufficient, the court of  
15 appeals would preclude the commissioner from denying them  
16 benefits based on their continued capacity to do that past  
17 job even if that job is still available to them, even if  
18 the employer is on the phone begging them to return to  
19 their job. The commissioner reasonably construed the  
20 statute as not compelling that result.

21           If there are no questions, I will reserve the  
22 remainder of my time for rebuttal.

23           QUESTION: I have a -- a question about the  
24 consistency of the argument you're now making with the --  
25 with the commissioner's regulation concerning you don't go

1 back more than 15 years. That seems to be a recognition  
2 that even if a person can do the job that he or she did 15  
3 years ago, yet there's a likelihood that maybe that kind  
4 of work isn't in abundant supply anymore.

5 MR. LAMKEN: Justice O'Connor, the concern of  
6 that 15-year --

7 QUESTION: I'm Justice Ginsburg.

8 MR. LAMKEN: Oh, Justice Ginsburg.

9 The concern of that regulation isn't whether or  
10 not that particular past job exists in significant  
11 numbers. It provides an administrable and in fact  
12 prophylactic test to make sure that the demands of that  
13 job are demands that are ones that are likely to be  
14 relevant in the national economy. It's unlikely that a  
15 set of demands of a job would completely disappear from  
16 the economy entirely during any one person's lifetime.

17 But to make assurance doubly sure, to make  
18 absolutely certain, the commissioner has set forth an  
19 administrable bright line, 15-year rule that says if the  
20 job is more than -- if you did the job more than 15 years  
21 ago, we won't consider it out of that concern. But it is  
22 not a consideration of whether the particular past job  
23 exists. It's a consideration to make sure that your  
24 continued ability to the demands of that job is an  
25 appropriate and accurate measure of your ability -- your

1 level of functioning, and that your level of functioning  
2 is consistent with work generally.

3 If there are no further --

4 QUESTION: May I ask this question just about  
5 the facts of this case, Mr. Lamken? When this applicant  
6 suffered her physical impairment -- I forget just what it  
7 was now -- she was able to go out and find a job as a -- a  
8 -- an elevator operator. Right?

9 MR. LAMKEN: That's correct. From -- if I  
10 remember correctly, from 1988 to 1995, she worked as an  
11 elevator operator.

12 QUESTION: If the absence of elevator jobs had  
13 occurred earlier and she hadn't been able to find this  
14 job, she would clearly be disabled, wouldn't she?

15 MR. LAMKEN: No, Justice Stevens, I'm not sure  
16 that she would be found disabled. The commissioner would  
17 have gone through the steps and -- and determined whether  
18 or not she had a severe --

19 QUESTION: She would have made the fifth step.

20 MR. LAMKEN: If you were not to consider the --  
21 the previous work of an elevator operator and you only  
22 applied the fifth step, which is the other work step, in  
23 isolation, that's correct, that she would have been found  
24 not able to do other work in the national economy. But  
25 the fifth step is designed to work in conjunction with all



1 the other previous steps and, standing alone, does not  
2 necessarily represent an accurate determination.

3 Congress provided two conditions that must be  
4 met, previous work and other work, precisely because the  
5 somewhat abstract inquiry into other work that plaintiff  
6 has -- the claimant has never done may not be a fully  
7 accurate or necessarily an easily administered mechanism  
8 for determining the level of work that the claimant can  
9 do.

10 QUESTION: See, the thought that was running  
11 through my mind, just to put it on the table, is that in a  
12 sense perhaps the Government's position creates a  
13 disincentive to look for other marginal jobs when you're  
14 in this position. You might be better off just not to  
15 look.

16 MR. LAMKEN: Justice Stevens, the commissioner's  
17 rules actually take into account incentives to look for  
18 work through the unsuccessful work attempt regulations.  
19 And so that is something that has been dealt with. And  
20 the same -- the same problem existed in the Walton case,  
21 for example. It is unfortunate that sometimes people, by  
22 engaging in socially desirable conduct, going out and  
23 working, will actually provide the evidence that shows  
24 that they're capable of working, but that is just a  
25 necessary consequence of a program that --

1                   QUESTION: Capable of working in a disappearing  
2 species of jobs.

3                   MR. LAMKEN: Well, Justice Stevens, the key  
4 point about the court of appeals decision is not limited  
5 to cases of job obsolescence. It's any time somebody is  
6 working in a job that may never have existed in  
7 substantial numbers. If they leave that job for whatever  
8 reason, if they quit or are fired for misconduct, under  
9 the court of appeals rule, the commissioner cannot deny  
10 them benefits based on their demonstrated ability to do  
11 that job.

12                  QUESTION: Suppose in Justice Stevens'  
13 hypothetical the employer said, you know, you can operate  
14 the elevator but it's just going to be going for 6 months.  
15 We're rehabbing the building and after that -- it's just a  
16 6-month job.

17                  MR. LAMKEN: Right.

18                  QUESTION: Then -- then is she again barred  
19 under step four?

20                  MR. LAMKEN: Justice Kennedy, that would -- it  
21 would depend on whether or not that sort of a temporary  
22 position would qualify as substantial, gainful work under  
23 the commissioner's regulations. If it is a make-work  
24 position or it's a position that does not represent  
25 functioning at a level -- it's a sheltered position or it

1 is some other -- some other reason that it is not evidence  
2 of functioning --

3 QUESTION: No, no. She can -- she can perform  
4 the elevator job completely well.

5 MR. LAMKEN: If this is something --

6 QUESTION: Everybody knows it's a -- it's a job  
7 that's soon to be obsolete, and she's told that.

8 MR. LAMKEN: Justice Kennedy, I think --

9 QUESTION: She'd be better off not taking that  
10 job.

11 MR. LAMKEN: In terms of getting --

12 QUESTION: Or suppose -- or -- or suppose she  
13 didn't take that job. Would she then still be barred?

14 MR. LAMKEN: If the -- if she did take the job,  
15 Justice Kennedy, and the job represented functioning at a  
16 level that's consistent with work generally that is  
17 substantial, gainful work, she would be barred. And she  
18 perhaps might be better off not taking the -- taking a job  
19 like that under the commissioner's regulations.

20 However, the mere fact that somebody taking a  
21 job provides evidence that they function at a level that  
22 is consistent with past work doesn't mean that we should  
23 come up with less accurate determinations by ignoring  
24 their demonstrated capacity to engage in their -- in their  
25 past work.

1           If there are no further questions.

2           QUESTION: Yes.

3           QUESTION: Very well, Mr. --

4           QUESTION: One -- one -- just one further  
5 question. In -- in this case if she made it to step five,  
6 it wouldn't be just a question that the burden would be  
7 switched to the Government, she would automatically  
8 prevail. Isn't that the case? Because of her age?

9           MR. LAMKEN: That's correct, Justice Ginsburg.  
10 The -- the way the commissioner's grids are set up, they  
11 make various assumptions regarding the effects of age, the  
12 exertion levels demanded by particular jobs, and other  
13 matters. And because it is a somewhat hypothetical  
14 inquiry to look into the many jobs somebody hasn't done in  
15 the past, the step five inquiry sometimes will render --  
16 will deem somebody not -- will deem somebody disabled even  
17 though they actually can work.

18           It is precisely because of that reason that  
19 Congress provided two measures of capacity to work: a  
20 highly empirical one, can the person do the jobs they  
21 actually have previously done in the past; and second,  
22 whether or not the person can engage in the other jobs  
23 that they haven't actually done in the past. And because  
24 the two steps work more accurately together, that's why we  
25 -- one of the reasons we believe that Congress provided

1 those two steps.

2 In addition, it also preserves the line between  
3 people who become unemployed because of their impairment,  
4 and ones who happen to be fully capable of doing their  
5 past jobs but lose those jobs for whatever reason, such as  
6 either technological obsolescence or they simply choose to  
7 leave those jobs voluntarily.

8 If there are no further questions.

9 QUESTION: Very well, Mr. Lamken.

10 Mr. Alter, we'll hear from you.

11 ORAL ARGUMENT OF ABRAHAM S. ALTER

12 ON BEHALF OF THE RESPONDENT

13 MR. ALTER: Mr. Chief Justice, and may it please  
14 the Court:

15 Today the commissioner argues against its own  
16 theme of providing a remedy when someone is disabled.

17 Congress did, indeed, intend to make a  
18 difference, to separate step four, previous work, from  
19 step five, or other work, but Congress told us what that  
20 separation is.

21 At the fourth step, previous work, age is not a  
22 factor, education is not a factor, and prior work  
23 experience is not a factor. This is simply because if a  
24 person wasn't too old to do his job or her job in 1995, we  
25 assume they weren't too old to do it in 1996. If a person

1 had the requisite education and skill level to perform the  
2 past job in 1995, then they have the same skill level and  
3 education level in 1996. And of course, prior work  
4 experience is irrelevant at step four because we're  
5 talking about the actual job that she did.

6           What Congress didn't intend was to pretend that  
7 a job that doesn't exist can still be used to deny  
8 benefits. Work has to be substantial. The commissioner  
9 concedes that. It has to be gainful. The commissioner  
10 concedes that. And it has to exist.

11           QUESTION: But your -- no. It has to exist in  
12 substantial numbers in the national economy. What you're  
13 -- you're arguing that a job that does exist and that this  
14 particular supposedly disabled person used to perform and  
15 which is offered to that supposedly disabled person but  
16 which that person turns down can, nonetheless, not count  
17 against the person's disability.

18           MR. ALTER: That is correct, Justice Scalia.

19           QUESTION: So it seems to me it's your position  
20 that -- that presents a really extraordinary situation.  
21 Let's say I'm a juggler, and I become disabled. And --  
22 and the circus I was a juggler at comes and says, you  
23 know, we -- we want you back. We can't find another  
24 juggler. There aren't that many because there are not  
25 that many juggler jobs in the national economy. Okay?

1 And I turn them down. I say, I'm tired of juggling. And  
2 you say that I'm handicapped even though my -- my prior  
3 job is -- is right there waiting for me. That seems to me  
4 an extraordinary result.

5 MR. ALTER: That is exactly what I'm saying,  
6 Judge Scalia -- Justice Scalia. I'm sorry. And the  
7 reason I say that is because a person is not disabled or  
8 not disabled at any one step of the sequential evaluation.  
9 Your Honor's question focuses on the immediate reason for  
10 the disengagement of the person from the workforce.  
11 That's not the commissioner's position. That hasn't been  
12 the commissioner's position. A person is not disabled or  
13 not disabled because of Ringling Brothers calls them on  
14 the phone and says, please, come back. They are disabled  
15 by operation of the sequential evaluation.

16 And the commissioner is the one who promulgated  
17 the sequential evaluation. And the sequential evaluation  
18 is a recipe with alternating steps regarding medical and  
19 vocational factors. And --

20 QUESTION: The commissioner has explained that  
21 it's -- using this test, can you perform your most recent  
22 job, as a proxy for instead of testing people to see the  
23 range of light work that exists in the economy. They say,  
24 we're just using this as a shorthand because it's  
25 administratively convenient. And it's not using it to

1 say, this person can do this job that's obsolescing,  
2 therefore she is not disabled. This particular job is a  
3 proxy for other jobs that require the same skill level.

4 Now, what's wrong with taking that position  
5 instead of subjecting people to a whole battery of tests?

6 MR. ALTER: Justice Ginsburg, your rendition of  
7 the commissioner's argument is exactly correct. If I were  
8 permitted to ask a question, I would ask myself a proxy  
9 for what. It is a -- the job doesn't exist. So,  
10 therefore, her ability to do the job --

11 QUESTION: In substantial numbers in the  
12 national economy.

13 MR. ALTER: National economy.

14 QUESTION: The very job may exist and be open  
15 for her to take.

16 MR. ALTER: Correct, but in most cases it  
17 wouldn't be open for her to take. That's the extreme  
18 position where -- and that's our position that happened in  
19 this case. And that's a very extreme position. And it  
20 would be an unintended consequence of the statute.

21 But Your Honor is absolutely correct that that  
22 is their position, that past work, even if it doesn't  
23 exist in substantial numbers, is a proxy for her ability  
24 to do other work. What other work?

25 At the fifth step, she's disabled because she



1 would not be able to make an adjustment to other work  
2 which exists in substantial numbers in the national  
3 economy, according to the commissioner's statistics.

4 QUESTION: Well, it's not according to the  
5 commissioner. It's according to the statute.

6 Can -- can we focus on the -- on the words of  
7 the statute? It says that the mental impairments --  
8 physical or mental impairments are of such severity that  
9 he is not only unable to do -- not only unable to do his  
10 previous work, but cannot, considering his age, education,  
11 and work experience, engage in any other kind of  
12 substantial, gainful work which exists in the national  
13 economy.

14 Now, you want to take that last phrase, which  
15 exists in the national economy, and attribute it to the  
16 earlier phrase, previous work. But if that's what  
17 Congress meant, why wouldn't they just have said that he  
18 is unable, considering his age, education, and work  
19 experience, to engage in any substantial, gainful work  
20 which exists in the national economy?

21 You -- you want to effectively read the first  
22 phrase, is not only unable to do his previous work, right  
23 out of the statute. They may just as well have dropped  
24 it. We don't read statutes to contain words that are  
25 totally superfluous, and you have made them totally

1   superfluous.

2                   MR. ALTER:   On the contrary, Your Honor.   The  
3   words, any other kind, would be superfluous.   Congress,  
4   indeed, intended to make a difference between previous  
5   work and any other kind of work, and that difference is,  
6   besides age, education, and prior work experience, which  
7   are irrelevant at step five -- they wanted to have the  
8   burden on the claimant for disability to show at the first  
9   four steps that she is disabled.

10                  At the fifth step, it is the commissioner who  
11   must show that she isn't disabled.   And that's why the  
12   words, which exist in the national economy, are in there  
13   to begin with because what they wanted to preclude was the  
14   commissioner saying, well, you can't do your prior job,  
15   but you can be a juggler.

16                  QUESTION:   Well, you see -- can we go back for a  
17   second to Justice Ginsburg's question?   Does this -- I  
18   mean, your reading of it is a possible reading, I -- I  
19   agree.   But they're saying their reading makes  
20   administrative sense.

21                  Now, this is my understanding of it.   A person  
22   has a bad back.   Now, there are bad backs and bad backs,  
23   but it's not a good thing to have.   So she has a bad back,  
24   and we want to know how bad it is.   And they're saying if  
25   it's very bad, she automatically is going to get the money

1 because at step three they'll look and see and say, look,  
2 this is a pretty bad back. It meets our criteria. That's  
3 the end of it.

4 But if it's medium bad, then what they're going  
5 to say is, well, first question is can she still do her  
6 last job as an elevator operator. And if the answer to  
7 that question is yes, that's the end of it.

8 And, therefore, if the answer, however, is no,  
9 then we've to go and gear up our vocational experts. Are  
10 there dolls' eyes' sewers? You know, they have a few odd  
11 jobs they usually bring in here --

12 MR. ALTER: I know.

13 QUESTION: -- to show they exist in the national  
14 economy. And -- and we get -- we don't want to go through  
15 that rigmarole.

16 So for a medium bad back, if you can still do  
17 your previous work as an elevator operator, you're not  
18 that handicapped. That's the end of it. Go to the  
19 unemployment office. Don't go to the -- the health  
20 office.

21 Now, what -- that to me makes sense. Now, what  
22 to you doesn't make sense?

23 MR. ALTER: Oh, it doesn't make sense at all  
24 Your Honor, to me, obviously.

25 (Laughter.)

1 QUESTION: No, no. Well, go ahead.

2 MR. ALTER: Your Honor's question seems to make  
3 step four, previous work, a gauge as to how severe the  
4 severe impairment is.

5 QUESTION: Exactly, and I think they suggest  
6 that might be so.

7 MR. ALTER: And -- but step four, previous work,  
8 is a remedy that the commissioner can use for their  
9 convenience. Why look at every job in the national  
10 economy? Let's start here and see if that medium bad back  
11 would preclude her from her past job. But to what end?  
12 So that she can resume that job. It seems to me, Your  
13 Honor, that once --

14 QUESTION: So you're not saying it is to that  
15 end because it's the unemployment office that's concerned  
16 about people who are out of work because you don't have  
17 elevator operators in the economy anymore. That -- it's  
18 not the Social Security office, they say, which is  
19 concerned about people who are physically hurt or mentally  
20 hurt.

21 MR. ALTER: Number one, Your Honor, Pauline  
22 Thomas could never collect unemployment insurance because  
23 the first thing they would ask her, are you ready,  
24 willing, and able to work? Do you have any medical  
25 problems? Once she has a severe impairment, at step two

1 the unemployment argument, issue, or -- or controversy is  
2 over. Once she shows -- because that's the threshold.  
3 When the -- when the statute says, by reason of a  
4 medically determinable impairment, it doesn't mean  
5 exclusively for medical reasons. But once she shows that  
6 medical impairment, to who? To the satisfaction of the  
7 commissioner. Once the commissioner says, yes, you have a  
8 severe impairment, then vocational issues, such as, okay,  
9 you can do a job, but does the job exist, become paramount  
10 because the -- the purpose of the statute, it seems to me,  
11 is to provide a remedy.

12 Now, there are two remedies that are possible  
13 after this sequential evaluation process. Remedy one,  
14 there are no jobs existing in significant numbers in the  
15 national economy that you can do. So here's your  
16 benefits. Remedy two, you know what? There are jobs  
17 existing, whether it's your job, whether it's another job.  
18 And therefore, we've done you a favor. We've told you  
19 that the economy can accommodate you after your injury.  
20 Therefore, go get that job.

21 QUESTION: Mr. Alter, if --if we think the  
22 statute may have certain ambiguities in it, why don't we  
23 owe deference to the Secretary's regulations and  
24 interpretation, which has been pretty consistent through  
25 the years?

1                   MR. ALTER: There are three answers to that  
2 question, Your Honor. First of all, I'm -- I'm  
3 crestfallen that -- that the Court would find that there's  
4 ambiguity. But given that -- that they would --  
5                   QUESTION: If we think there is.  
6                   (Laughter.)  
7                   QUESTION: And we're not crestfallen.  
8                   (Laughter.)  
9                   QUESTION: Pick up your crest and go on, Mr.  
10 Alter.  
11                   (Laughter.)  
12                   MR. ALTER: If the statute is ambiguous, the  
13 commissioner's construction must still be reasonable.  
14 Here, I would say it is not reasonable. That's the first.  
15 Because it -- it begs reality. The reality is this job  
16 doesn't exist in substantial numbers. Or at least, we  
17 want to be able to show that at an administrative hearing.  
18                   QUESTION: Mr. Alter, how do you deal with the  
19 fact that a number of circuits and, indeed, three judges  
20 on this en banc court thought exactly that, that this was  
21 an ambiguous regulation, that it had been applied  
22 consistently by the Secretary, and that it was entirely  
23 reasonable, the -- the notion that your current work is a  
24 proxy for can you do light work, that that's a -- not a  
25 necessary or inevitable one, but a reasonable one?

1                   MR. ALTER: Justice Ginsburg, first, let me take  
2 the -- the last part of your sentence. Proxy to do light  
3 work. She wins at light work at step five. So again,  
4 it's a proxy to do light work.

5                   QUESTION: No. Step five in her case we've  
6 established is an automatic. It's not that she's shown  
7 that she can't do light work. The commissioner says,  
8 look, when you get to be 55 years old, we're not going to  
9 mess with that. If you can't do your prior job, that's  
10 it.

11                  MR. ALTER: But it's the reason why, Your Honor,  
12 because she can't make an adjustment to any jobs. If a  
13 person can do light work, that proxy issue, she can do her  
14 past job which is light, then she can do other light jobs.  
15 But the commissioner tells us that she won't be able to  
16 adjust to other light jobs. And will she be able to  
17 adjust to her current job? There is no adjustment to a  
18 current job, unless the job doesn't exist.

19                  But to answer your question about the other  
20 circuits, the other circuits -- circuits focused on the  
21 regulation, focused on the ruling, 82-61. That says,  
22 well, it doesn't make a difference whether the job exists.  
23 It's whether you can do that job. And most of the other  
24 circuits said, well, the regulation says do your past job  
25 -- a strict reading of do your past job means the capacity

1     rather than a reality standard. But they didn't focus on  
2     the statute.

3                     And if I might answer Judge -- Justice  
4     O'Connor's question about ambiguity, if I haven't answered  
5     your question.

6                     QUESTION: No, you haven't because there's  
7     another piece of it. For the future, regulation that  
8     doesn't apply in your case, the -- the commissioner has  
9     clarified that what we mean is can you do the physical  
10    aspects of this job and we don't look to see whether it's  
11    an obsolescing job, a brand new regulation that doesn't  
12    apply to your case.

13                    On your argument, I take it -- you're going now  
14    back to the statute -- that new regulation is an  
15    impermissible construction of the statute.

16                    MR. ALTER: That is exactly correct, Your Honor.

17                    May I, Justice O'Connor, answer your question?  
18    The deference owed to their -- the commissioner's  
19    construction of the statute is not much. It's Skidmore  
20    deference.

21                    QUESTION: What?

22                    MR. ALTER: Skidmore deference, Skidmore v.  
23    Swift.

24                    QUESTION: Oh, I thought you said Skidmore.

25                    (Laughter.)



1                   MR. ALTER: Chevron, the -- the great case, the  
2 elephant in this room -- Chevron has a two-step policy.  
3 The first one has been precluded by Your Honor's question,  
4 whether the statute is ambiguous. The second part says,  
5 well, it owes great deference to the commissioner's  
6 position, but not, Your Honor, in a construction of a  
7 statute. It is this Court's role to tell us what the law  
8 is and what the law means.

9                   QUESTION: Now, what does Chevron amount to? I  
10 mean, if -- if you're -- it struck me always that the --  
11 the first step is is the statute ambiguous, and second, if  
12 it is, is -- is the construction reasonable. It is by  
13 definition a construction of the statute you're talking  
14 about in the second step.

15                  MR. ALTER: Yes, Your Honor, but I believe under  
16 U.S. v. Mead the Court did make a distinction between a --  
17 an administrative policy --

18                  QUESTION: But Mead was -- but Mead was not a  
19 Chevron case.

20                  MR. ALTER: Mead was a construction by an agency  
21 case, and Mead says, I think -- my -- my reading is that  
22 if a -- an administrative policy is at issue, great  
23 deference has to be given. But a construction of a  
24 statute -- an agency does not have deference, great  
25 deference, because of administrative --

1                   QUESTION: I -- I rather thought that's what  
2 Chevron was all about. I'm interested that you don't  
3 think so.

4                   MR. ALTER: Well, my reading, Your Honor, is  
5 that Chevron deference will only apply to an agency's  
6 statutory interpretation if it emerged from a formal  
7 adjudication.

8                   QUESTION: I certainly don't see that in Mead.  
9 I -- I mean, I understand that there have been views  
10 around taken from the dissent I think, that maybe that's  
11 what it says, but when I read it about 17 times now --

12                   (Laughter.)

13                   QUESTION: -- it didn't seem to say that. I  
14 mean, it said that -- that certainly if they have formal  
15 proceedings, that would be a strong ground for thinking  
16 that we would apply Chevron. And if they didn't, it  
17 doesn't mean we won't. Did you get all the double  
18 negatives?

19                   (Laughter.)

20                   MR. ALTER: I understand. All I can do is  
21 assert that if Chevron means that if we find some sort of  
22 ambiguity in a Federal statute, we give pretty much carte  
23 blanche to the agency. That was my reading of Chevron.  
24 That would be a disappointing reading of Chevron because I  
25 think --

1                   QUESTION: If it's reasonable. If the agency  
2 has given it a reasonable construction. And from former  
3 questions this morning, the suggestion is that the  
4 regulatory approach is kind of an administrative shortcut  
5 for finding out whether this employee is basically able to  
6 do certain types of light work.

7                   MR. ALTER: I would argue, Your Honor, that it  
8 is not reasonable in any -- by any stretch of the word  
9 because may I remind, Your Honor, that we're talking about  
10 a job which may not exist at all, and a finding that a  
11 person is not disabled because they're capable of doing a  
12 job that doesn't exist can't be reasonable. If we take --  
13 I -- I say that --

14                  QUESTION: Why is that? What does -- what does  
15 disabled have to do with doing a job? I mean, disabled is  
16 a -- is a physical condition, and they say if you can do  
17 the job you used to do, you're not disabled.

18                  MR. ALTER: Your Honor --

19                  QUESTION: The word is disabled, not unemployed.  
20 Unemployment insurance is something different. It's a  
21 different program. This program is not meant to provide  
22 for unemployment. It's meant to provide for disability.

23                  MR. ALTER: But what I meant --

24                  QUESTION: And all the -- all the Secretary is  
25 saying is if you can do your prior job, you're not

1 disabled. That seems quite logical to me. I --

2 MR. ALTER: Let me try to highlight the  
3 illogical parts of that then, Your Honor.

4 Unemployment has nothing to do with this  
5 litigation. The person has a severe impairment. As a  
6 matter of fact, let's be precise. The person has cardiac  
7 arrhythmias. The person had a heart attack and returned  
8 to work. The person had a -- a herniated disc and  
9 cervical radiculopathy. According to the commissioner's  
10 construction here, the only job in the world that she  
11 could adjust to is a job which may not exist.

12 Once she has a severe impairment, Your Honor can  
13 bring up unemployment for the rest of the session, but  
14 unemployment is a red herring in this case because once  
15 you have a severe impairment, we're not talking about  
16 unemployment anymore. We're talking about --

17 QUESTION: Then she should -- we should have  
18 ended it at step three, but the commissioner makes a  
19 distinction. And her impairment, because it wasn't on the  
20 chart, doesn't make it. She is not at that point  
21 disabled. You have to go on to the next step. If she  
22 were disabled, that would be the end of it and we wouldn't  
23 -- but she isn't disabled under this formulation because  
24 she's not within the conditions that that's the end of the  
25 examination.

1                   MR. ALTER: Justice Ginsburg, your question and  
2 Justice Scalia's question seem to me to define disability  
3 in a vacuum. She is disabled -- she isn't disabled  
4 because she can do a job. Suppose she can be -- she be --  
5 she can deliver ice. That job doesn't exist anymore  
6 either. Suppose she could be a court jester. Disability  
7 has --

8                   QUESTION: You're the one that -- that is tying  
9 disability to employment, not -- not Justice Ginsburg and  
10 I. And -- and yet, you keep saying that -- that  
11 unemployment insurance is a red herring. You're the one  
12 that keeps bringing it in. You -- you say we can't tell  
13 whether the person is disabled unless the person can get a  
14 job, but that's not the statutory requirement for  
15 disability.

16                  MR. ALTER: Your Honor, I am not saying that a  
17 person is disabled unless they can go get a job. What I'm  
18 saying is that disability means that a medical impairment  
19 prevents you from adjusting to work which exists in the  
20 national economy.

21                  QUESTION: And they are saying, to take your  
22 example, if you're a former iceman and you're still strong  
23 enough to deliver ice, you're probably able to do other  
24 jobs. What is unreasonable about that, even if there's no  
25 ice delivery anymore?

1                   MR. ALTER: Because at step five, when the  
2 commissioner says that you cannot adjust to other jobs, I  
3 take them at their word. Statistically, according to the  
4 commissioner's sequential evaluation, according to the  
5 commissioner's vocational rules, there will not be an  
6 ability to adjust to any other job which exists in the  
7 national economy.

8                   QUESTION: And -- and at the point at which you  
9 get to step five, you've already found that the person  
10 can't deliver ice anymore. So there has already been a  
11 finding of some disability to some degree irrespective of  
12 the capacity to go to a nonexistent job. I mean, the --  
13 the proxy determination has already been made before you  
14 get to step five. Isn't that right?

15                  MR. ALTER: That is correct, Your Honor.

16                  QUESTION: That's what step four is there for.

17                  MR. ALTER: That -- that is correct, Your Honor,  
18 but we keep getting back to that proxy, that word proxy.  
19 Well, even if your job doesn't exist, it's a proxy for  
20 your ability to do other jobs. But what other jobs?

21                  QUESTION: Well, if you're an -- first of all, I  
22 don't know why it doesn't exist. We have elevator  
23 operators in this building.

24                  MR. ALTER: Yes, Your Honor. I gave her my  
25 card.

1 QUESTION: All right. So -- so, I mean --

2 (Laughter.)

3 QUESTION: It points out a certain unrealism A  
4 person who works in an elevator is a pleasant person, and  
5 they sit down for some of the day and they're up --  
6 standing up for some of the day. And they have to see  
7 that people get on and off properly. It requires a degree  
8 of intelligence. It requires a degree of personality. It  
9 requires a certain degree of skill. And so there -- you  
10 would have thought there would have been a lot of other  
11 jobs like that in the economy. And, I mean, even if there  
12 aren't too many elevator operators, there are some.

13 I mean, I'm trying to point out the realism that  
14 they say exists behind their -- their assumption there.  
15 And it's pretty hard. We're talking about -- it's really  
16 hard to find an example that fits the category you want to  
17 say this is in.

18 MR. ALTER: Your Honor's question about the  
19 elevator operator is a -- a serious one because an  
20 elevator operator we have in this Court pushes buttons.  
21 Yes, there's personality involved, but I -- I don't think  
22 that one of these individuals would be denied this job if  
23 she didn't have a sterling or -- or a wonderful  
24 personality. She pushes buttons. That's not what my  
25 client did. My client operated an elevator.

1           The reason we have elevator operators in this  
2 building, I'm assuming, is to add to the majesty of the  
3 building, for security purposes so I don't wander up and  
4 down the halls where I'm not supposed to go. There are  
5 elevator operators in luxury buildings which really act as  
6 security or helping people with parcels.

7           This person pushes a button, and she's here for  
8 a reason, which really has nothing to do with what my  
9 client was doing. She was opening a gate and opening a  
10 door, et cetera, and pushing the actual buttons, and  
11 operating -- well, you've -- everyone has seen an elevator  
12 operator from the old days.

13           The point is -- the point is that all we want to  
14 do is show -- an opportunity to show what every SSI  
15 claimant can show. I believe it was Justice O'Connor who  
16 -- who asked is there a difference between the regulations  
17 in title II and title XVI, and my colleagues said  
18 correctly, no, there aren't.

19           How about this? How about Pauline Thomas never  
20 worked a day in her life? She was on welfare her whole  
21 life. She doesn't have a step four. We treat people  
22 under this construction who have worked, as Pauline Thomas  
23 does -- and I promised her I would say this, so I'm going  
24 to say it -- for 27-and-a-half years, 110 quarters of  
25 coverage. And she paid in all that time, sweeping and



1 cleaning, and mopping bathrooms in a nursing home, and had  
2 a heart attack and went back to work. We don't treat her,  
3 under this construction, as well as we treat a person who  
4 never worked a day in her life because then she  
5 automatically goes to step five where she's disabled.  
6 That's the first prong.

7           The second thing -- I don't know if the Court  
8 has an actual transcript, but how do we treat this person  
9 differently? Pauline Thomas will get -- this controversy  
10 is about \$672 a month in disability benefits after 27-  
11 and-a-half years. If she had not worked a day in her life  
12 --

13           QUESTION: Mr. Alter, can we go back to one  
14 thing that you said I don't think was quite right? You  
15 said all we want is an opportunity to show. That's not  
16 so. If you get to step five, you win, and the Government  
17 has conceded that. You don't have to show anything. So  
18 you're looking for -- you say if -- step four, if she  
19 prevails on that, that is the end of the inquiry. You  
20 will not -- it's not incumbent on you to show anything.

21           MR. ALTER: In this particular case, if we get  
22 to step five, we will win. But what we want to show is  
23 not -- obviously, Ms. Thomas wants the benefits and I want  
24 to win the case. But what we would be showing is that  
25 past work is not a proxy for another kind of work if the

1 past work doesn't exist because we want to be able to show  
2 -- it's what we already know -- that the commissioner says  
3 that there is no ability to adjust to another job. Here,  
4 if her job doesn't exist, she will have to adjust to  
5 another job whether we call it her past job or not.

6 What I want to --

7 QUESTION: She did work at this job for -- well,  
8 7 years, did she not?

9 MR. ALTER: Correct.

10 QUESTION: Because she -- at one point in your  
11 brief, you said that she had been an elevator operator.  
12 At page 42, you said for a few months. That was wrong.

13 MR. ALTER: A few years, Your Honor. I'm -- my  
14 mistake.

15 As I was saying, if she went and applied for SSI  
16 in New Jersey, she would get \$583.25 as we sit here right  
17 now. So the difference between the 27 years of work and  
18 no work is, number one, she has a better chance, because  
19 she doesn't have to go through step four; and number two,  
20 she gets another \$80. That construction leads to a  
21 disengagement between the worker who's paying the freight  
22 so that the commissioner can have their convenience and  
23 their construction and the actual program. The program  
24 must reflect reality. Disability is a word, but it's a  
25 concept that comes after the commissioner has put in place

1 a sequential evaluation. And that sequential evaluation  
2 is based on the realities of the workplace. It has always  
3 been.

4 As a matter of fact, may I point one thing out  
5 -- two things actually. Number one, the commissioner  
6 doesn't call it past work. The statute calls it previous  
7 work. The commissioner calls it past relevant work. What  
8 is more irrelevant than a job that doesn't exist? Number  
9 one.

10 Number two, the commissioner says that there are  
11 no vocational considerations at step four. We don't care  
12 about whether the job exists or not. But that's not the  
13 case because the commissioner's own ruling states for a  
14 fact that if you can't do your past job as you performed  
15 it, we can still deny you benefits at step four by saying  
16 that we -- you can do your past job as it's performed in  
17 the national economy. That's a vocational consideration.  
18 I never performed that job that way. My job is much  
19 harder. Yes, but when we look into the dictionary of  
20 occupational titles, we find your job and many jobs are  
21 done in a lighter version. You can do that job. But I  
22 never did it before. Vocational considerations.

23 SSI claimants have more rights and make the same  
24 money as disability claimants. There's something wrong  
25 with that in terms of public policy.

1 QUESTION: Thank you, Mr. Alter.

2 MR. ALTER: Thank you.

3 QUESTION: Mr. Lamken, you have 19 minutes  
4 remaining.

5 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

6 ON BEHALF OF THE PETITIONER

7 MR. LAMKEN: Thank you.

8 First, I wanted to point out that step four in  
9 fact is a measure of severity. The question is how severe  
10 does the impairment have to be, and the statute tells you  
11 exactly how far -- how severe it has to be. It has to be  
12 so severe that the claimant is unable to do his previous  
13 work. So the step four inquiry of previous work is a  
14 measure of severity, and the commissioner has consistently  
15 used that measure of severity to determine whether the  
16 individual is functioning at a level that is consistent  
17 with work generally.

18 In fact, in terms of the deference to which the  
19 commissioner's construction is entitled, this has been the  
20 commissioner's current construction from the outset of the  
21 program, both from before this -- the particular  
22 provisions we've been discussing were adopted in 1967 and  
23 after. We believe that they're clearly reflected in the  
24 commissioner's regulations from 1978, and any -- any  
25 ambiguity in those regulations was cleared up in 1982 with

1     respect -- by the issuance of SSR 82-40.

2                 The commissioner's current regulations, which  
3     became effective September 25th, now make it abundantly  
4     clear and explain in absolutely certain terms that the  
5     commissioner does not consider whether or not the previous  
6     work exists in significant numbers in the national  
7     economy. Because that is the result of a rulemaking,  
8     because it is clearly the commissioner's well-considered  
9     and longstanding interpretation of the statute, it is  
10    entitled to deference.

11                QUESTION: Those regulations were subject to  
12    notice and comment rulemaking?

13                MR. LAMKEN: Yes. In fact, there was a very --  
14    there was a lengthy comment period, and then they went  
15    through the entire process and were issued quite a few  
16    years actually after the comment period was completed.  
17    But yes, those were not -- notice and comment rulemaking,  
18    Justice Ginsburg.

19                In fact, the clarification came in in response  
20    to a public comment that particular issue wasn't -- was  
21    germane to the rulemaking, but it wasn't one the  
22    commissioner had initially planned to address. But a  
23    commenter said, please clarify that in fact you do  
24    consider whether previous work exists in the national  
25    economy. And the commissioner said, no, no, you've got it

1 wrong. We do not consider it. Our longstanding view has  
2 always been we do not consider whether previous work exists  
3 in substantial numbers in the national economy.

4 QUESTION: Mr. Lamken --

5 MR. LAMKEN: Yes.

6 QUESTION: -- could you clarify something? I  
7 asked this of -- of Mr. Alter, and I -- I didn't quite  
8 understand his -- his answer. Do you understand the  
9 respondent's position in this case to be anything other  
10 than saying that the statute means it could be abbreviated  
11 to read this way, that he is unable, considering his age,  
12 education, and work experience, to engage in any kind of  
13 substantial, gainful work which subsists in the national  
14 economy?

15 MR. LAMKEN: I -- the respondent's position does  
16 have the effect of completing the two separate inquiries.

17 QUESTION: Well, eliminating the first entirely,  
18 does it not eliminate the first entirely?

19 MR. LAMKEN: The one thing that -- that it  
20 wouldn't take into account is that in the first inquiry,  
21 the commissioner does not take into -- in the previous  
22 work inquiry, the commissioner does not take into account  
23 age, education, and work experience. And your formulation  
24 would make age, education, and work experience relevant to  
25 all work, previous work and past work. However, we

1 believe that if Congress had intended --

2 QUESTION: Well, but -- but if he was doing his  
3 previous work, it is impossible to find that considering  
4 his age, education, and work experience, he couldn't do  
5 it. I mean, it's --

6 MR. LAMKEN: I -- I think that's precisely  
7 right. It makes it -- as a --

8 QUESTION: It's an impossibility anyway.

9 MR. LAMKEN: Right. As a structural matter, it  
10 would make it relevant, but in fact it would be rarely, if  
11 ever, a factor the commissioner would use in terms of  
12 denying disability benefits. So it does definitely have  
13 the effect of taking what Congress set out as two separate  
14 conditions precedent and merging them to a degree which  
15 Congress probably did not intend.

16 Finally, for 45 years in adjudicating more than  
17 40 million claims -- and that includes approximately  
18 200,000 step four, that is, previous work denials a year.  
19 That's 500 denials a day for every day of every year --  
20 the commissioner has consistently applied this  
21 construction. That construction has functioned well  
22 throughout all these years. Accordingly, we ask the Court  
23 to reverse the judgment of the court of appeals and to  
24 reinstate the commissioner's construction.

25 QUESTION: Thank you, Mr. Lamken.

1                   The case is submitted.  
2                   (Whereupon, at 10:49 a.m., the case in the  
3 above-entitled matter was submitted.)  
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